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In The

Supreme Court of the United States

No. ~~1728~~ 70-186

UNITED STATES OF AMERICA,
Plaintiff-Appellee-Respondent,
vs.
TOP SHIPPERS ASSOCIATION, INC., and
FRANCIS A. FINBERG,
Defendants-Appellants-Petitioners.

PETITION FOR WRIT OF CERTIORARI FROM NO. 29,561 IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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JUDICIAL HISTORY OF CASE

This case was tried before a jury in the United States District Court for the Northern District of Texas, at Dallas, and Petitioners, a shipping association, and its manager were convicted in twelve counts of violating the Elkins Act, 49 USC Section 41 by knowingly by means of a device, soliciting, accepting, and receiving concessions in interstate transportation by "falsely representing on the shipping documents" that a portion of the shipment was cotton braids or scarfs, well knowing that the articles were hats to which a higher rate would apply.

The jury verdict and rulings of the trial court on Petitioners' Motions were appealed to the United States Court of Appeals for the Fifth Circuit where the judgment was affirmed on the Summary Calendar over Petitioners' objection. Petitioners were not permitted oral argument and the Fifth Circuit Opinion (Appendix I) states only the Court's Fiat as does the Denial of Petitioners' Petition for Rehearing (Appendix II).

JURISDICTION

I. DECREE TO BE REVIEWED

The United States Court of Appeals for the Fifth Circuit entered its Decree on February 1, 1971 (Appendix III).

II. PETITION FOR REHEARING

The United States Court of Appeals for the Fifth Circuit denied Petitioners' Petition for Rehearing on April 20, 1971 (Appendix II).

III. STATUTORY BASIS FOR CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI BY UNITED STATES SUPREME COURT

This Petition to the Supreme Court is based upon 28 USC Section 1254(l) which provides that a case in the court of appeals may be reviewed by writ of certiorari granted "upon petition of any party to any...criminal case...after rendition of judgment or decree."

QUESTIONS PRESENTED FOR REVIEW

A. Petitioners' substantial right to be tried only on charges as presented in an indictment returned by a grand jury was violated where there was, as in this case a variance between the indictment and the proof.

POINT ONE. There was a fatal variance between the intentional fraud which the Government alleged and stated it would prove against Petitioners and the evidence adduced during the trial.

POINT TWO. There was no substantial evidence to support the allegations in the Indictment that the Petitioners obtained concessions by the alleged device of "falsely representing on the shipping documents" certain things, and the Government did not sustain its burden to prove beyond a reasonable doubt that the Petitioners obtained concessions by such alleged device.

POINT THREE. The Trial Court erred in admitting, against objection by Petitioners, testimony as to how the consolidating company prepared shipping documents by a witness who was not shown to have prepared any shipping document referred to in the Indictment.

POINT FOUR. The Trial Court erred in admitting, against the objection of remoteness as to the alleged 1967 shipments of the indictment, testimony of Mr. Sabatini relating to a telephone call to Mr. Finberg in July or August of 1965, with respect to a then completed shipment.

B. Petitioners were deprived of their constitutional right under the Sixth Amendment "to be informed of the nature and cause of accusation..." and to trial on the accusation as alleged.

POINT FIVE. Under the circumstances of this case, the Trial Court erred in instructing the jury as to the essential elements to establish the offenses charged in such a form as would permit the jury to find the Petitioners guilty of accepting or receiving a concession even if they were to find them innocent of soliciting a concession.

POINT SIX. There was no substantial evidence to support any allegations that the Petitioners solicited, accepted or received any concession "by means of a device," to wit, false representations by the Petitioners on the shipping documents, and the Government did not sustain its burden to prove such allegations beyond a reasonable doubt.

C. The introduction of admittedly irregularly prepared Business Documents by a witness who did not prepare same and which did not qualify under the statutory Business Documents exception to the Hearsay Rule, as against objection by Petitioners, deprive these Petitioners of their right to cross examine one or more of those who had actually prepared such documents as to why they had been prepared as they had been.

POINT SEVEN. The Government did not sustain its burden to prove beyond a reasonable doubt that the Petitioners knew what was in the cartons which they never opened.

POINT EIGHT. There was no substantial evidence to support the allegations in the Indictment that concessions in approximate specified amounts were obtained by Petitioners where proof at best would be approximately 26% less than the amounts so specified.

POINT NINE. There was a material variance between the Government's theory of what was in the particular cartons as alleged in the Indictment and the proofs.

POINT TEN. Despite the Court's instructions, the jury gave no consideration to the word "approximately" in determining whether the Government had sustained its burden of proving the amount specified in the Indictment, and did not discuss the matter one way or the other.

D. Petitioners were substantially prejudiced and deprived of a fair trial in that they were convicted "without due process of the law" and denied a fair and complete hearing.

POINT ELEVEN. The Petitioners were substantially prejudiced and deprived of a fair trial by reason of statements by the prosecuting attorney in his rebuttal argument, timely objected to by Petitioners, that "the Government could have filled" the courtroom with paper on a case like this, and kept you here for three days or three weeks, and, "the Government could have brought lots more exhibits."

POINT TWELVE. The Petitioners were substantially prejudiced and deprived of a fair trial by reason of statements by the prosecuting attorney in his rebuttal argument which in effect placed the burden of proof on Petitioners concerning certain essential elements which the Government was required to prove beyond a reasonable doubt where the prosecuting

attorney stated in effect that these Petitioners should have subpoenaed the purchase order documents to show what was actually in the shipments referred to in the Indictment and where he also stated in effect that these Petitioners should have subpoenaed the individuals in New York who did the actual manifesting for the various shipments, to which Petitioners objected.

POINT THIRTEEN. Petitioners were substantially prejudiced by the action of the United States Court of Appeals for the Fifth Circuit in placing this case on a Summary Disposition Calendar without any opportunity to make any oral presentation whatsoever and the Appellate Court's failure to answer with a rational opinion and statement of the case the arguments and points presented; all against objection by these Petitioners.

STATUTE OF CASE

ELKINS ACT

49 U.S.C. Section 41

See Appendix IV.

STATEMENT OF THE CASE

Petitioners are a shippers' association located in Dallas, Texas, and its local manager, who were indicted under the Elkins Act (Tit. 49 U.S.C. Sec. 41) and convicted on twelve counts of knowingly, by means of a device, soliciting, accepting and causing to be solicited, accepted and received, certain concessions, amounting in all to approximately $1,046.92 or an average of $87.24 per shipment of twelve consolidated shipments amounting to 797,451 pounds or almost 399 tons, or an average of 66,454 pounds per shipment, over a period of approximately three months from February 15, 1967, to April 7, 1967, allegedly transported at a less rate and charge than named in the common carrier tariffs filed with Interstate Commerce Commission, by the alleged device of "falsely representing on the shipping documents" that a portion of the consolidated shipment consisted of "cotton braids" or "cotton scarfs" and paying lower transportation charges based on such description, allegedly well knowing that such articles were in fact "hats or caps, not millinery" and "millinery or millinery goods, noibn," to which higher rates and charges were applicable under carriers' tariffs.

Petitioners moved for judgment of acquittal at the conclusion of the evidence introduced by the Government and at the close of the evidence by both the Government and Petitioners and, following the announcement of the jury verdict, moved for judgment of acquittal, or in the alternative, for a new trial, each of which motions was denied by the Trial Court.

Petitioner Shippers Association, a non-profit Texas corporation, is an association of shippers in the Dallas area operating to secure the benefits of carload or other volume rates for themselves, on a non-profit basis. These members have suppliers in New York City from which the members of the Association

purchase various products which must be transported from New York to Dallas.

Following the placement of an order with a supplier in New York City, the member will direct the supplier to send the shipment to the Association in Dallas for ultimate consignment to the local member. The supplier then sends the shipment and its shipping orders to a company in New York City, in this case called Rex Consolidators, which consolidates such shipment with those from other suppliers so that they will be transported together to Dallas.

Upon receiving such shipments from the various suppliers along with the shipping orders, the consolidating company checks and loads such shipments into rail boxcars, prepares a shipping document called a manifest, and then seals the boxcar, and presents the Railroad with a bill of lading indicating the consolidated shipment in accordance with the manifest.

In preparing the manifest, the consolidator indicates thereon the designation of the shipment and the description of the items included in the shipment, including the original shipper's name, the consignee, location, the number of pieces, the description of the articles, the weight and charges. The consolidator prepares a six-part manifest, and furnishes two copies to the originating railroad, in this case the Pennsylvania Railroad, and two copies by air mail special delivery to Top Shippers Association. One copy is retained by the consolidator; the other copy accompanies the shipment. The consolidator in New York also sends to the Association copies of the shipping orders prepared by the New York suppliers.

At a contact point, the Pennsylvania Railroad then switches the boxcars containing the shipments to the St. Louis South-

western Railway which then transports them to Dallas where Top Shippers unloads and sorts the shipments for delivery to the various members who are the ultimate consignees.

The St. Louis Southwestern Railway Company makes up a work sheet to determine the applicable rate charge based upon the description on the manifests in accordance with tariffs published by the Commission and the carrier. From the worksheet, the Railway prepares freight bills which are sent to Top Shippers, which paid all such bills covering the shipments referred to in the Indictment.

Upon receipt of the shipment by the Shippers Association, the manifest is checked by the manager, Mr. Finberg, who turns them over to his assistant, Mr. Allen B. Kingsbury, who prepares the freight bills for the members of the Association receiving the shipment. Such freight bills are different from those prepared by the Railway and are based on the Association's own schedule of rates to its members which are also different from the Railway's tariff rates.

The railway tariff rate for individual hats was $6.62 per hundred-weight, $5.63 for "nested" hats or hats "nested solid," and $2.75 for scarfs and cotton braids. So far as members of Top Shippers Association were concerned, the charges by the Association to such members for either "hats" or "scarfs" was $4.80 per hundred-weight; and on the freight bills sent out by the Association, in this case, Mr. Kingsbury would describe all such items, whether "hats," scarfs, neck wear, beach wear, or other items bearing the $4.80 charge, as "hats," or indicate same by "do" meaning "ditto."

In this case, all shipments referred to in the Indictment were ultimately consigned to the Rhealee System, and Rhealee Stores which are two of almost two hundred members of Top Shippers Association.

Except on rare occasions, neither the consolidator nor the employees of the Shippers Association ever see what is on the inside of any carton being shipped, and there is no evidence that either the consolidator or the Association employees ever saw the contents of the cartons included in the shipments during the period involved in the Indictment in this case.

Subsequent to the verdict, counsel for Petitioners obtained an affidavit from the Jury Foreman. This statement, which was obtained with the consent of the Trial Court and with the knowledge of the United States District Attorney states among other things that neither he nor the other members of the jury would have found Petitioners guilty beyond a reasonable doubt of soliciting concessions, (Appendix V).

Petitioners appealed the rulings and findings of the District Court to the United States Circuit Court of Appeals where the case was placed upon that Court's Summary Calendar. Though Petitioners objected to the placing of the appeal upon the Summary Calendar (Appendix VI) and the lack of a full and complete hearing, the appeal remained on the Summary Calendar and Petitioners were denied oral argument and an Opinion.

ARGUMENTS AMPLIFYING REASONS FOR GRANT OF WRIT

FIRST ARGUMENT STATED

Petitioners would show this Honorable Court that the United States Court of Appeals for the Fifth Circuit has departed far from the accepted usual course of judicial proceedings in denying these Petitioners an opportunity for oral argument and further, in failing to write an opinion recognizing, dealing with, and answering Petitioners' points of error; this Summary method of review is presently used by the United States Court

of Appeals for the Fifth Circuit in approximately fifty percent of direct criminal appeals.

SECOND ARGUMENT STATED

Petitioners would further urge the grant of the Writ because the United States Court of Appeals for the Fifth Circuit, in failing to write an opinion, has approved Petitioners' criminal conviction of a criminal act other than that for which Petitioners were indicted by a grand jury and because the result conflicts with opinions of the Supreme Court of the United States and with provisions of Amendment Six to the United States Constitution.

FIRST ARGUMENT RESTATED

On December 13, 1968, the United States Court of Appeals for the Fifth Circuit instituted a system whereby a portion of the cases coming before the Court for consideration were submitted on written briefs without oral argument. The appellate court is utilizing the summary disposition of appeals from criminal convictions at an increasingly alarming rate. In *Isbell Enterprises, Inc. v. Citizens Casualty Co. of N.Y.*, 431 F.2d 409 (5th Cir. 1970), the United States Court of Appeals for the Fifth Circuit discusses with apparent pride and without note of the protection of Appellants' basic rights, the shortening of time between convictions and final disposition in criminal cases and discusses the two rules which that court utilizes to reduce delay: denial of oral argument and affirmance without opinion.

The United States Supreme Court has not to date approved or disapproved specifically of the disposition on briefs without oral argument or the affirmance without opinion as provided by the Rules for the United States Court of Appeals for the Fifth Circuit. Petitioners would show the Court that affirmance

without opinion in a case in which oral argument has been denied over objection, and where no attempt has been made to meet the arguments propounded in a rational discourse, denies the Petitioners a full and complete hearing as provided by the Fifth Amendment to the United States Constitution which guarantees that no person in a criminal case shall be deprived of property without *due process* of law.

The *Isbell* case sets forth statistics concerning the Summary disposition of appeals by the United States Court of Appeals for the Fifth Circuit for the last half of Federal Year 1969 and for the entire Federal Year 1970. These figures reflect that 32.7% of all cases which came before the Court for the period during the Federal Year 1969 were handled in a Summary fashion and that this percentage increased to 38.1% for Federal Year 1970. During Federal Year 1970 a total of four hundred fifty-two (452) cases were considered on the Summary Calendar. Of the cases considered on the Summary Calendar, during the period of Federal Year 1969, fifty-eight (58), or 26.8% were direct criminal appeals and during Federal Year 1970, one hundred thirty-one (131), or 29% were direct criminal appeals. Of the two hundred seventy (270) direct criminal appeals in Federal Year 1970 one hundred thirty-one (131) were placed on the Summary Calendar (48.5%), a substantial increase over the period of Federal Year 1969 when of one hundred seventy-seven (177) cases, only 31.6% were placed on the Summary Calendar. These figures can only be interpreted to show as does the appellate court's language, that the United States Court of Appeals for the Fifth Circuit intends to consider an increasing percentage of its cases on the Summary Calendar. Such a judicial cloak denies appellants even a public statement of their position or discussion of the facts of the case and bears the mark of a heavy handed new "speedup" procedure where issues are disposed of by the simplistic expression that the trial below

was correct and appellants' arguments are simply dismissed with conclusions rather than with the traditionally requisite written, rational discussion and disposition of the various issues presented even if those issues be unique.

Affirmance without opinion denies to other litigants and legal observers the opportunity to review the Court's reasoning in light of stated facts for comparison and evaluation by other minds which might read the reports.

These Petitioners would show the Court that they objected to the decision of the reviewing judge of the United States Court of Appeals for the Fifth Circuit to place their appeal on the Summary Calendar (Appendix VI).

SECOND ARGUMENT RESTATED

Petitioners would further show the Court that the Writ should be granted because the decision of the United States Court of Appeals for the Fifth Circuit in affirming the judgment of the United States District Court conflicts with opinions of the Supreme Court of the United States and with the provisions of Amendment Six to the United States Constitution which provides that in all criminal prosecutions, the accused shall enjoy the right to be informed of the nature and cause of the accusation.

STATEMENT

The Indictment delivered against Petitioners alleged in each Count that the Petitioners "did knowingly by means of a device, solicit, accept, and receive and cause to be solicited, accepted and received...a concession..."

The Indictment in each Count also specifies the device used, "That is to say the Defendants by the device of false

representing on the shipping documents...obtained the concession as aforesaid."

The trial court instructed the jury on these points as follows:

> "The essential elements which are required to be proved in order to establish the offense charged in each Count of the Indictment are:
>
> "First, the act or acts of knowingly, by means of a device, soliciting, accepting *or* receiving any concession in respect to the transportation of any property in Interstate Commerce by a common carrier, subject to the Interstate Commerce Act.
>
> "Each of the Counts of the Indictment alleges that the Defendants solicited, accepted and received a concession. It is not necessary that the Government prove all three acts, it is only necessary that the Government prove beyond a reasonable doubt that a particular Defendant committed one of the three acts, that is, that the Defendant or either of them, either solicited or both, either solicited or accepted or received a concession as alleged in the Count then under consideration."

ARGUMENT

Irrespective of whether the Government was required to allege any specific device, it having done so, the proof is limited to it, *U.S. v. Altman*, 8 F.Supp. 880 (D.C.W.D.N.Y. 1934), at p. 882; *Stirone v. U.S.*, 361 U.S. 212, 4 L.Ed.2d 252, 80 S.Ct. 270 (1960), and irrespective of what the Government intended to charge or could have charged, the evidence admitted for the jury's consideration, and the instructions of the trial court to the jury must be judged with respect to the charges actually alleged in the Indictment. *Epstein v. U.S.*, 174 F.2d 754 (6th Cir. 1949); *Walker v. U.S.*, 104 F.2d 465 (4th Cir. 1919).

The Government thus had to prove that the Defendants below falsely prepared the shipping documents in 1967, or that whoever did falsely prepare the documents did so in response to the solicitation of the Defendants, which would be an intentional course of conduct to defraud.

It is unchallenged that the Defendants did not prepare such documents; the documents were prepared solely by an independent consolidating company in New York City, which Company was the agent of the New York suppliers, not the agent of Defendants. The essence of the Government's case, therefore, as to the alleged "device" was to prove beyond a reasonable doubt that the Defendants solicited the New York consolidator to falsely represent the alleged matter on the shipping documents.

It was the Government's intention to prove intentional fraud, and in his opening statement to the jury, the United States attorney stated the following: "Now the Government anticipates proving that Mr. Finberg, and thereby, Top Shippers, devised a scheme, a device to obtain a concession, that is, a financial advantage or financial benefit by paying a less rate than prescribed in the applicable railroad tariffs, that is, applicable railroad price rates." Later, in his argument to the jury, he stated that, "This has all the characteristics of a scheme, an intentional course of conduct to defraud." These statements of the prosecuting attorney are entirely consistent with the Government's position as specifically alleged in the Indictment. The solicitation by Defendants to get the consolidator falsely to represent such matters on the shipping documents was the very heart of the alleged device or scheme as urged by the Government.

The Government was required to prove that there was some device, plan or scheme, used by the Defendants to obtain

concessions. Although Petitioners understand that the "device" need not be fraudulent unless so alleged, it still must be "a plan or contrivance – that which is devised or formed by design...an invention; a project." *Armour Packing Co. v. U.S.*, 209 U.S. 56, 52 L.Ed. 681, 28 S.Ct. 428 (1908).

The device alleged was one of intentional fraud. A plan or contrivance requires a two-party transaction, and although one party may be innocent and not violative of the Elkins Act, the Government must prove that at least one of the parties devised the plan or contrivance or formed it by design. *Continental Shippers' Assn. v. U.S.*, 328 F.2d 966 (9th Cir. 1964) at p. 968; *U.S. v. Koenig Coal Co.*, 270 U.S. 512, 70 L.Ed. 709, 46 S.Ct. 392 (1926), the latter case pointing out that if one party acts innocently and does not plan or contrive the device, then that party is not in violation of the Elkins Act even though the other party may be.

Any act or acts of acceptance or receipt of concessions required to be proved in order to establish the offense charged are clearly connected with the words "by means of a device" which were inseparably related by the Government's allegation as to the nature of the device as solicitation on the Defendants' part for falsely representing on the shipping documents the description by the consolidators.

Under the circumstances in this case, the separation of the alleged act or acts of acceptance and receipt from the alleged act or acts of solicitation by Defendants was erroneous and misleading to the jury. In this case, because of the specific allegation of the "device" allegedly used by the Defendants to obtain concessions, the essence of the theory charged by the Government was false representation by the Defendants followed by their acceptance and receipt of the undercharged

goods, and, at least in this case, the charge should have been in the conjunctive rather than in the disjunctive.

In *U.S. v. Altman*, 8 F.Supp. 880 (D.C.W.D.N.Y. 1934), the court makes it very clear that in trials under the Elkins Act, "...the particular device having been alleged, the proof, of course, is limited to it." (p. 882)

Although fraud and the *particular* "device" used do not have to be specifically described and proved under the Elkins Act, if the device is specifically alleged and described, it must be proved. *Armour Packing Co. v. U.S.*, 209 U.S. 56, 52 L.Ed. 681, 28 S.Ct. 428 (1908). The device of falsely representing was specifically alleged in this case and the Government attorney prosecuted the case on the theory that Defendants engaged in the fraudulent scheme to defraud the Railroad.

Any act of acts of acceptance or receipt of concessions required to be proved in order to establish the offense charged were clearly connected with the words "by means of a device" which were inseparably related by the Government's allegation as to the nature of the device as solicitation on the Defendants' part by falsely representing on a shipping document the descriptions by the consolidators. Therefore, under the circumstances in this case, the separation of the alleged act or acts of acceptance and receipt from the alleged act or acts of soliciation by the Defendants was erroneous and misleading to the jury. The instruction in effect shifted the burden of the prosecution after all the evidence had been presented *from* the burden of proving the alleged solicitation *and* receipt *and* acceptance to the mere burden of proving solicitation *or* receipt *or* acceptance. The instruction as given by the Trial Court fails to note the interrelationship between acceptance and receipt on the one hand and solicitation on the other hand based on the "device" alleged.

The fact that the Government did not sustain its burden to prove beyond a reasonable doubt that the Petitioners devised a scheme to defraud the Railroad or that they solicited concessions from the Railroad by such alleged device is demonstrated in the jury foreman's affidavit (Appendix V).

With the consent of the Court, and without objection by the Government, attorneys for Petitioners interviewed the jury foreman, Mr. Alfred Lintz less than a month after the verdict was rendered, and approximately one week after the imposition of sentence. The interview was conducted after the Assistant U. S. Attorney, who prosecuted the case had been previously notified. The affidavit was presented and read to the Court at the hearing on Motion for New Trial at which time the Government attorney made no objection to the Court's consideration of the affidavit.

The jury foreman stated, concerning the findings of the jury upon the trial court's instructions:

> "It is my opinion that the jury believed that the Defendants had accepted or received merchandise on which there was a tariff rate undercharge but that the Defendants had not solicited such concessions when the final vote was taken.
>
> "The question of how Mr. Finberg could be found guilty for the actions of the men in New York, the Sabatinis and Rex Consolidators, was overcome by the Judge's instruction which to our understanding stated in effect that there was an agency involvement. Personally, I do not believe that the Government proved that the Defendants made any false representations on the shipping documents involved, to wit, the manifests prepared in New York, and if I had been under the impression that this was an essential part of the Government's case I would have voted for a verdict of 'not guilty,' and in my opinion the rest of the jury would have done likewise.

> "It is my opinion that if the Government had been required to prove beyond a reasonable doubt that the Defendants had solicited and accepted and received the concessions, the verdict would have been 'not guilty.' "

The jury foreman's affidavit is overwhelming evidence of the fact that the variance between the pleading and proof and the instructions as given by the Trial Court to the jury could not be considered harmless error.

The charge of the Trial Court in separating the alleged act or acts of solicitation by Defendants, such acts being tied together in the Indictment by their common connection with the Allegation that all of such facts were *by means of a device*, specifically pleaded, was erroneous and misleading to the jury. Any application of the rule of conjunctive pleading and disjunctive proof, under the circumstances of this case, deprives these Petitioners of the protection of the Sixth Amendment to the Constitution "to be informed of the nature and cause of the accusation..." and to trial on the accusation as alleged.

As previously mentioned, the *Armour Packing Company* case indicates that the Government might have drawn the Indictment in more general terms without the specific allegation as to the particular kind of the device used, but the Government *did not* do so in this case. The United States Supreme Court Opinion in *Stirone v. U.S.*, 361 U.S. 212, 4 L.Ed.2d 252, 80 S.Ct. 270 (1960) at pp. 257-258 of 4 L.Ed.2d is most relevant:

> "...It follows that when only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not on another, even though it be assumed that under an Indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another has been burdened."

In the present case, under the charges made, the jury may have failed to appreciate that the specifically alleged device charged to the Petitioners must be connected to the alleged acts of "acceptance" and "receipt" by Petitioners as well as to the alleged act of "solicitation." If the Trial Court had charged the jury as requested by the Defendants, the jury could not have been under any misunderstanding, and the jury could have found the Petitioners "not guilty," and if the jury foreman's statement is accepted, would have done so.

CONCLUSION

For all the reasons above stated, Petitioners pray that this petition for writ of certiorari be granted and that the Supreme Court of the United States hear their appeal, that the judgment of conviction against them be reversed, that the fine be set aside, and that they be discharged with their costs.

Respectfully submitted,

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By _____
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_____
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Top Shippers Association, Inc. and
Francis A. Finberg

CERTIFICATE OF SERVICE

I, the undersigned attorney for Appellants certify that a copy of the Petition for Writ of Certiorari was mailed to Eldon B. Mahon, United States Attorney for the Northern District of Texas, United States Courthouse, Dallas, Texas 75201, Counsel for Respondent, on this the 20th day of May, 1970.

G. Ward Beaudry,
Attorney for Appellants

APPENDIX I

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 29561

Summary Calendar*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TOP SHIPPERS ASSOCIATION, INC., and FRANCIS A. FINBERG,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

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(February 1, 1971)

Before WISDOM, COLEMAN, and SIMPSON, Circuit Judges.

PER CURIAM: In this case a jury found Top Shippers Association, a corporation, and Francis A. Finberg, its manager, guilty, in twelve counts, of violating the Elkins Act, 49 U.S.C.

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* Rule 18, 5th Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al, 5th Cir., 1970, 431 F.2d 409, Part I.

§41. This statute prohibits the knowing solicitation, acceptance, and receipt of concessions from a railroad company in the transportation of property in interstate commerce at a less rate and charge than that named in the tariffs of the common carrier as published and on file with the Interstate Commerce Commission. The minimum fine prescribed by statute was assessed on each count against each defendant.

Counsel for appellants express the view that the case raised complex and fundamental constitutional issues. We disagree. As in all cases, we have carefully considered the numerous (twelve) assignments of error urged on behalf of Top Shippers and Mr. Finberg. We find the case peculiarly appropriate for Rule 21 disposition, that is, the evidence on behalf of the government, accepted by the jury clearly established the wilful, deliberate, continued and continuous activities of the defendant-appellants, Further, they received a fair trial, devoid of reversible error. A detailed discussion and point by point rejection of the twelve grounds asserted for reversal would be of no precedential value whatever.

Nothing remains, then, but to direct that the judgment of the District Court be and it is hereby

AFFIRMED.

APPENDIX II

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 29561

Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

TOP SHIPPERS ASSOCIATION, INC., and
FRANCIS A. FINBERG,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

(April 20, 1971)

ON PETITION FOR REHEARING

Before WISDOM, COLEMAN, and SIMPSON, Circuit Judges.

PER CURIAM: IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby

DENIED.

APPENDIX III

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1970

No. 29561

Summary Calendar

D. C. Docket No. CR 3-1601-C

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

TOP SHIPPERS ASSOCIATION, INC., and
FRANCIS A. FINBERG,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

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Before WISDOM, COLEMAN, and SIMPSON,
Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

February 1, 1971

Issued As Mandate:

APPENDIX IV

ELKINS ACT

49 U.S.C. Section 41

Liability of corporation carriers and agents; offenses and penalties.

Liability of corporation common carriers; offenses; penalties; jurisdiction

(1) Anything done or omitted to be done by a corporation common carrier, subject to chapter 1 of this title, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said chapter or under sections 41, 42, or 43 of this title, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in chapter 1 of this title or by sections 41, 42, or 43 of this title, with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to chapter 1 of this title to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said

chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of sections 41, 42, or 43 of this title, or of chapter 1 of this title, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

APPENDIX V.

In The

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

No. Cr-3-1601-C

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

TOP SHIPPERS ASSOCIATION, INC.,
a Corporation, and
FRANCIS A. FINBERG,
Defendant-Appellant.

AFFIDAVIT OF ALFRED LINTZ

I, Alfred Lintz, was the foreman of the jury which heard the evidence and determined the guilt of Top Shippers Association, Inc. and Francis A. Finberg on November 7, 1969; based upon all the evidence admitted during the trial and the instructions of the Judge.

As the foreman and a member of the jury I make the following statements:

1. Upon retiring for deliberations, I was elected foreman.

2. Four (4) votes were taken on the question of guilt beyond a reasonable doubt. These votes were:

(guilty)	(not guilty)
A. Eight (8)	Four (4)
B. Nine (9)	Three (3)
C. Ten (10)	Two (2)
D. Twelve (12)	

3. During the initial three votes the persons who indicated they did not believe that either Defendant was guilty felt very strongly about the matter. It was only after I emphasized to the jury that the Judge's instructions said that to find the Defendants guilty we must find beyond a reasonable doubt only that the Defendants either solicited or accepted or received the concessions that the guilty verdict was reached. It was upon the either or concept rather than upon all three (solicitation, acceptance, and receipt) that the final verdict was based.

4. It is my opinion that the jury believed that the Defendants had accepted or received merchandise on which there was a tariff rate undercharge but that the Defendants had not solicited such concessions when the final vote was taken.

5. The question of how Mr. Finberg could be found guilty for the actions of the men in New York, the Sabatinis and Rex Consolidators, was overcome by the Judge's instructions which to our understanding stated in effect that there was an agency involvement. Personally, I did not believe that the Government proved that the Defendants made any false representations on the shipping documents involved, to wit, the manifests prepared in New York, and if I had been under the impression that this was an essential part of the Government's case I would have voted for a verdict of "not guilty" and in my opinion the rest of the jury would have done likewise.

6. It is my opinion that if the Government had been required to prove beyond a reasonable doubt that the Defendants had solicited and accepted and received the concessions, the verdict would have been "not guilty."

7. If the Government had been required to prove beyond a reasonable doubt that the Defendants had solicited and accepted and received the concessions I would have voted for "not guilty."

8. It was my impression that the jury did not give any specific consideration to the word "approximately," concerning the amounts of the overcharges on the shipping documents. We did not discuss this one way or another.

9. It was the impression of the jury that they were to determine whether or not there was sufficient evidence upon which to base a later criminal trial where Mr. Finberg could receive a sentence.

DATED June 12, 1970.

/s/ ALFRED ROY LINTZ
Alfred Lintz
6819 Sweet Sue Lane, South Oak Cliff
Dallas, Texas

SWORN TO AND SUBSCRIBED before me by the said Alfred Lintz this the 12th day of June, 1970, to certify which witness my hand and seal of office.

/s/ G. WARD BEAUDRY
Notary Public in and for
Dallas County, Texas

APPENDIX VI.

December 21, 1970

United States Court of Appeals
for the Fifth Circuit
Room 408 – 400 Royal Street
New Orleans, Louisiana 70130

Re: No. 29561 – Top Shippers Association, Inc. and Francis A. Finberg vs. United States of America, Appeal from the United States District Court for the Northern District of Texas

To The Honorable Court:

As attorneys for Defendants-Appellants, Top Shippers Association, Inc. and Francis A. Finberg, we have been notified that a panel of the Court, after due consideration and pursuant to Local Rule 18, has transferred the above referenced cause to the Summary Calendar for disposition.

We would respectfully represent to the Honorable Court that the subject case should be handled in a speedy and summary manner to the end that the criminal conviction of the Defendants-Appellants be set aside. If, however, the transfer to the Summary Calendar upon the Court's own motion is designed to, or results in the affirmation of the prior decision of the United States District Court for the Northern District of Texas on the complex and fundamental constitutional issues involved in this case, we must object to the Summary Calendar setting.

Defendants-Appellants believe strongly that the trial court erred in its application of the law to the facts in this particular case which in effect constitutes a denial of their rights as set forth in the Constitution of the United States and the

Amendments thereto as further set out in Appellants' Brief and Reply Brief, and therefore feel compelled to object to a setting which prevents Defendants-Appellants from making an oral development of their position which may be essential to the Court's understanding of the issues as posed by the Appellants.

Respectfully submitted,

/s/ G. WARD BEAUDRY

G. Ward Beaudry
Of Lane, Savage, Counts & Winn
3330 Republic Bank Bldg.
Dallas, Texas 75201

vw

cc: Mr. Eldon B. Mahon
United States Attorney
Dallas, Texas 75201

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1728

TOP SHIPPERS ASSOCIATION, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Texas, petitioners were convicted on twelve counts of violating the Elkins Act, 49 U.S.C. 41, in that they "did knowingly, by means of a device, solicit, accept and receive and cause to be solicited, accepted and received" unlawful rebates on shipments by a common carrier (A. 302).[1]

[1] "A." refers to volume 2 of the appendix in the court of appeals; we are lodging this volume with the Clerk of this Court.

Petitioners were fined a total of $12,000—*i.e.*, $1,000 (the minimum statutory fine) on each count. The court of appeals affirmed without oral argument (Pet. App. 1-2).

1. The evidence showed that petitioner Finberg was the manager of petitioner Top Shippers Association, Inc., a non-profit shipper's cooperative of some 200 members who were primarily located in the Dallas, Texas area; they had organized the cooperative to obtain the advantages of consolidated shipping of freight (A. 8-11). Shipments ordered by member retailers were received in New York by Rex Consolidation Agency where it consolidated the shipments to its various clients, including Top Shippers (A. 8, 52-53).

The procedure was for the suppliers to ship the merchandise to Rex in sealed cartons accompanied by bills of lading listing the quantity, weight and description of the merchandise (A. 52-58). After consolidating the cartons in a rail boxcar, Rex would deliver the sealed boxcar to the railroad with a shipping manifest it prepared; this manifest listed the quantity, weight and description of the boxcar's contents and its destination (A. 52-59). The railroad's charges to Top Shippers were based on the published, approved tariffs of the railroad as computed from the information contained on the shipping manifest (A. 175-177). The custom was for Top Shippers to receive a copy of the manifest and other shipping papers by mail from Rex about three days before the arrival of the boxcars (A. 15-18, 58-59). Top Shippers would then prepare an invoice to be forwarded to each retail member for its particular shipment; this

invoice would list the charge to that member based on Top Shippers' own rate schedule (A. 18-22). The merchandise was then delivered to the retailer by Top Shippers' affiliate, Top Truckers (A. 22-23).

On twelve separate occasions, during February, March and April of 1967, shipments for Dallas retailer Rhealee, consisting primarily of hats, were received by Rex for consolidation and shipment from New York (A. 146-158, 163-169). Consistent with the practice established at the request of Mr. Finberg of Top Shippers in 1965, Rex listed these shipments as "scarves" or "cotton braid" (A. 80-82, 84-87, 108-110, 132-135). The approved tariff for scarves or cotton braid was $2.75 per hundred pounds; the tariff for hats was $6.62 per hundred pounds, and for "nested" hats, $5.63 (A. 176-183). The total undercharge, or concession, due to the misrepresentation of the twelve shipments was approximately $1,046.92 (A. 186-195). The charge by Top Shippers to members was the same for either hats or cotton braids or scarves—$4.80 per hundred pounds (A. 238). The freight bills, prepared by Top Shippers and submitted to its client in each of these twelve instances, showed the shipments to be hats. These freight bills were prepared from the shipping manifests received from Rex; in each case, petitioner Finberg changed the shipping manifests by crossing out "scarves" or "cotton braid" and inserting "hats" (A. 18-20, 36, 38-39).

2. Petitioners contend that there was a fatal variance between the indictment and the trial court's in-

structions. Count 1 is representative; it alleges in pertinent part:

> "That on or about March 3rd, 1967, at Dallas, Texas * * * Top Shippers * * * and its manager, Francis A. Finberg, and each of them did knowingly by means of a device, solicit, accept and receive and cause to be solicited, accepted and received from the St. Louis Southwestern Railway Company, a common carrier, by railroad engaged in Interstate Commerce for hire, a concession * * * in respect to the transportation by said common carrier railroad * * * where the shipment was delivered to Top Shippers Association, Inc., the consignee, whereby said property was transported at a rate less than charged * * * in the tariffs * * * by the device [of defendants] of falsely representing on the shipping documents that a portion of the consolidated shipment consisted of cotton braids or cotton scarfs and paying lower transportation charges based on such description * * * (A. 301-302).

Petitioners urge that the indictment as thus written required the government to prove that they "solicited" rebates [2] but that the court instructed the jury that it could convict simply on a finding of knowing receipt or acceptance of the rebate. (A. 305-306, 308-309). In this connection, petitioners rely upon a post-verdict affidavit of the jury foreman that he would have voted to acquit had the court's charge made solicitation an essential element of the offense (Pet. 18-19; Pet. App. V).

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[2] There is no claim as we read the petition that the government failed in this proof.

This contention was summarily rejected by the court below and warrants no further review.[3] It is bottomed on a hyper-technical and questionable construction of the indictment and is at odds with the plain intent of the statutory scheme.

The purpose of the Elkins Act is to eliminate all rebates on property transported by a common carrier in interstate commerce; to achieve its broad aim the statute prohibits solicitation, acceptance or receipt of a concession less than the published rates as separate offenses. The Act reflects the considered congressional judgment to "make certain that once a tariff had been published, no deviations whatever from that tariff would take place." Its prohibitions are not limited "to only some kinds of rebates or to only some people." *United States* v. *Braverman*, 373 U. S. 405, 408. This is not a case like *Stirone* v. *United States*, 361 U. S. 212, where the defendant was convicted of a crime not charged in the indictment. Petitioners were fully apprised of the charges against them, which clearly included improper receipt of rebates. The government's evidence sustained those charges and no further prosecution for any of these acts is permissible. See, *e.g.*, *Armour Packing Co.* v. *United States*, 209 U. S. 56, 83.

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[3] The panel placed this case on summary calendar and dispensed with oral argument. This procedure, which the Fifth Circuit has instituted to deal with insubstantial claims, does no violence to the requirements of due process. See *Payton et ux* v. *United States*, 425 F. 2d 1324 (C.A. 5), certiorari denied, 400 U.S. 957. We are providing counsel with a copy of our brief in opposition in *Payton* (No. 713, this Term).

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1971.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 428131 720